

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7:09-CV-00208-F

TINA MCMILLAN,)	
)	
Plaintiff,)	
)	
v.)	ORDER
)	
MOSES CAREY, JR., <i>Chairman,</i>)	
and EMPLOYMENT SECURITY)	
COMMISSION OF NORTH CAROLINA,)	
)	
Defendants.)	

This matter is before the Court on Defendants' motion to compel discovery and for sanctions [DE-15]. Plaintiff failed to respond to the motion, and the time for responding has expired. Accordingly, this matter is ripe for review.

On May 26, 2010, Defendants served, by mail to Plaintiff's attorney, a First Set of Interrogatories and Request for Production of Documents. Defendants received no response within the thirty days allowed pursuant to Rules 33 and 34 of the Federal Rules of Civil Procedure. Defendants' counsel thereafter attempted to contact Plaintiff's counsel regarding the discovery by letter of August 31, 2010 and by phone on September 15 and 16, 2010. On September 17, 2010, Plaintiff's counsel reportedly responded that the discovery was not completed because he anticipated that the matter would settle and that Plaintiff was difficult to contact, but that he would *try* to contact her and could *possibly* have discovery completed within a week. Defendants then proceeded to file this motion.

I. Motion to Compel

An order compelling discovery is appropriate where a party fails to answer an interrogatory or to respond to a discovery request and the movant certifies that he made a good faith attempt to resolve the matter without court action. Fed. R. Civ. P. 37(a)(1) & (3). The Court finds that Defendants have satisfied the requirements of Rule 37 and that they are entitled to an order compelling Plaintiff to respond to Defendants' First Set of Interrogatories and Request for Production of Documents. Accordingly, Defendants' motion to compel is **GRANTED** and Plaintiff shall respond to the requested discovery no later than **December 30, 2010**. Furthermore, the discovery deadline is extended to **January 28, 2011**, and the dispositive motions deadline is extended to **February 28, 2011**. The trial of this matter is continued to Senior Judge Fox's **July 5, 2011** term of court in Wilmington, North Carolina.

Defendants also sought to recover from Plaintiff the cost associated with this motion. If a motion to compel is granted, "the court *must*, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Fed. R. Civ. P. 37(a)(5) (emphasis added). Accordingly, Defendants are **DIRECTED** to file an affidavit setting forth their attorney's fees and expenses associated with filing this motion no later than **December 30, 2010**, and Plaintiff shall file any response thereto no later than **January 6, 2010**.

II. Motion for Sanctions

“A court has discretion to impose sanctions, up to and including dismissal, when a party fails to comply with discovery orders.” *Steward v. Avaya, Inc.*, No. 5:06-cv-232-F, 2007 WL 2746858, at *5-6 (E.D.N.C. Sept. 19, 2007) (Fox, J.) (citing Fed. R. Civ. P. 37(b); Fed. R. Civ. P. 37(d); *Mutual Fed. Sav. & Loan Ass'n v. Richards & Assocs.*, 872 F.2d 88, 92 (4th Cir.1989)). “Additionally, the Fourth Circuit has emphasized the importance of warning a party about the possibility of dismissal prior to entering such a sanction.” *Id.* at *6 (Citing *Hathcock v. Navistar Int'l Transp. Corp.*, 53 F.3d 36, 40 (4th Cir.1995)).

The Court at this time declines to impose sanctions in addition to the potential award of fees and expenses associated with the granting of the motion to compel. However, Plaintiff is hereby put on notice that **failure to comply with this order may result in dismissal of Plaintiff's action or other sanctions, pursuant to Rule 16(f) and Rule 37 of the Federal Rules of Civil Procedure.**

Accordingly, Defendants' motion for sanctions is **DENIED** with leave to re-file in the event Plaintiff further fails to comply with discovery obligations or orders of the Court.

This the 17th day of December 2010.


DAVID W. DANIEL
UNITED STATES MAGISTRATE JUDGE